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August 18, 2006

VIA ELECTRONIC SUBMISSION

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* response of Illinois municipalities to AT&T Ex Parte Letter dated May 24, 2006, in the matters of *IP-Enabled Services,* WC Docket No. 04-36; *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992,* MB docket No. 05-311.

Dear Ms. Dortch:

This letter, filed on behalf of several Illinois municipalities in the Chicago area,[1] responds to the above-referenced *ex parte* communication submitted by AT&T to the FCC on May 24, 2006. AT&T's letter of May 24 concerned an ongoing dispute between the municipalities and AT&T with regard AT&T's proposed "Project Lightspeed" network deployment and "U-Verse" video programming service. In response to the enactment by Illinois municipalities of temporary moratoria halting the issuance of construction permits for numerous large cabinets related to Project

[1] The following Illinois municipalities join in this letter: City of Geneva, City of North Aurora, City of Wheaton, City of Wood Dale, Village of Carpentersville, Village of Itasca, and the Village of Roselle (herein collectively Illinois Municipalities).

Lightspeed, AT&T filed suit against several municipalities in the United State District Court for the Northern District of Illinois.[2]

AT&T's letter of May 24 contains numerous misstatements of fact and mischaracterizations that the Illinois Municipalities cannot leave on the record unchallenged. In addition, the experience in the field of the Illinois Municipalities and other communities with AT&T should be instructive to the FCC, as the agency considers the IP-Enabled Services docket, the Local Franchising NPRM, and other proceedings that may affect longstanding principles of local control over the public right-of-way, and localities' obligations to assure the public safety, health and welfare of their citizens.

The ostensible reason for AT&T's *ex parte* letter of May 24 is to call for preemptive action by the Commission[3] relating to the disputes between AT&T and the Illinois Municipalities. AT&T wants the FCC to block the Illinois Municipalities' valid exercise of their obligations to their citizens. AT&T suggested to the Commission that the Illinois Municipalities' adoption of temporary moratoria is a targeted conspiratorial effort to thwart AT&T's deployment of advanced services, with dire consequences for the broadband future of the entire nation.[4]

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2 *Illinois Bell Telephone Company v. Village of Itasca, Illinois*, Docket No. 06 C 2439, N.D. Ill., *consolidated with* 06-1919 (Village of Carpentersville), 06-1922 (Village of Roselle), 06-2008 (City of Wheaton), 06-2436 (City of Geneva), 06-2437 (City of Wood Dale), 06-2439 (Village of North Aurora).

3 Preemptive action by the FCC would be preposterous, as a matter of public policy and as matter of legal authority. The FCC does not possess the legal authority to preempt the legislative actions of the local governments. While this letter is not intended to provide a full legal brief on the merits, suffice it to say that the longstanding general principle limiting the authority of a federal administrative agency with regard to the legislative actions of a governmental body cautions against any such action by the FCC.

4 To the contrary, local governments will go to great lengths to facilitate the deployment of advanced, competitive services in their communities. "Local franchise authorities nationwide welcome competition and are eager to issue additional franchises to compete with existing cable operators." Ms. Lori Panzino-Tillery, on behalf of NATOA *et al.,* Testimony before the Federal Communications Commission, Keller, TX, 1 (Feb. 10, 2006). "[L]et there be no mistake, local governments want competition, as fast and as much as the market and some state laws will sustain." The Hon. Marilyn Praisner, on behalf of NATOA *et al.* Testimony before the House Energy and Commerce Committee, 2 (Nov. 9, 2005). Far from opposing the technology AT&T seeks to deploy, the communities that AT&T has targeted are proactively seeking a way for that technology to be brought into their communities without destroying the competition that currently exists (with current cable

Nothing could be further from the truth. The Illinois Municipalities *want* advanced services in their communities, and they *want* competition as rapidly as is reasonably possible. They have adopted moratoria only because they believe that they need a brief delay to study the unprecedented issues presented by the construction of Project Lightspeed facilities in their jurisdictions and arrive at a proper course of action. The moratoria will not impede AT&T's deployment of advanced services more than a few months (litigation by AT&T notwithstanding). Certainly, the localities would not even do that unless they had very good reasons, as outlined below. Moreover, if AT&T is truly interested in rapid deployment and providing wireline competition, its tactic of suing the Illinois Municipalities in response to temporary moratoria does not reflect such a desire.

There are two key points that the Illinois Municipalities wish to emphasize to the Commission. First, given the scale of the proposed Project Lightspeed construction, the unknowns are many, and the public safety and aesthetic effects of the placement of numerous large cabinets throughout the communities – and how AT&T intends to mitigate the adverse impact – are not at all clear. AT&T's plan goes well beyond a run-of-the-mill upgrade; it amounts to the deployment of a second infrastructure throughout the communities in question. To complicate matters further, AT&T has been less than forthcoming with regard to providing the Illinois Municipalities adequate information on which to base regulatory decisions, as we outline below.

The second key point relates to the potential obligation of AT&T to obtain a cable franchise before deploying a system for the delivery of its U-Verse video programming service. While the issue is unsettled and opinions vary, the deployment of Project Lightspeed and the U-Verse video service may well trigger an obligation by AT&T under the federal Cable Act to obtain a local franchise. Indeed, counsel for the Illinois Municipalities has concluded that Project Lightspeed and U-Verse probably is a "cable service" subject to franchise obligations.

In short, given the unknowns, and the contentiousness of these issues, the moratoria enacted by the Illinois Municipalities are a reasonable, prudent course of action to enable further study and responsible local action. Unfortunately, AT&T has chosen to file lawsuits in response, adding expense and delay to what was already a challenging process.

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providers) and without violating State level playing field laws, as discussed in further detail below.

Background. To fully appreciate the nature of AT&T's lawsuits against the Illinois Municipalities and to provide the FCC with the Illinois perspective, it is necessary to understand the underlying facts. The facts reveal that AT&T has been less than candid in its dealings with the local governments – and in its letter of May 24 to the Commission.

AT&T seriously downplays the impact on local communities of its Project Lightspeed system construction. AT&T states that its Project Lightspeed deployment "would use existing AT&T rights-of-way and would otherwise conform to applicable zoning requirements." The Municipalities are not at all sure that AT&T's Project Lightspeed deployment will "conform to applicable zoning requirements." That is an important issue that they hope to address during the moratoria. In fact, the facilities AT&T apparently intends to deploy are of a type and dimension not previously examined by Illinois Municipalities. AT&T, however, expects to undertake the construction of its system(s) without a reasonable opportunity for local officials to better understand its impact and to determine what is needed to protect local interests.

As experience around the country has demonstrated, AT&T's Project Lightspeed involves *significant* impact to the public right-of-way, above and beyond that required for its current Internet and telephony services. The primary facility at issue is known as a "52B" utility box. It is an above-ground, metal box containing interconnection electronics and cooling facilities, and each can apparently serve roughly 300 Project Lightspeed subscribers. While there appears to be some variation among the reported sizes of such boxes, the typical 52B box stands more than five feet high, over three feet in depth, and over 20 inches wide. Other sources report that they may be as large as 6'3" tall, over three feet wide, and nearly two feet deep. Each is installed on a concrete pad that extends substantially beyond the bounds of the metal box itself.[5]

The installation of numerous 52B boxes for Project Lightspeed could be highly disruptive to local vehicular traffic, and may create significant sighting problems for traffic corners. In older sections of cities, where sidewalks are frequently too

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[5] To further appreciate the impact these boxes will have on the public right of way and private property, we invite the Commission to view a brief video tour of 52B boxes produced by City of Foster City, California for the purpose of educating city staff about their size and location: http://www.fostercity.org/community_info/telecomm/ATT-Project-Lightspeed-Site-Visits.cfm.
Additional photos of Project Lightspeed facilities are available here: http://www.lightreading.com/document.asp?doc_id=91846&print=true, and here: http://www.cabletv.com/t-project-lightspeed/119-photos-dark-side-moon.html.

narrow to host such a large utility box, ADA and other pedestrian concerns are likely to arise, potentially affecting commuters, local businesses and homeowners. In addition to public safety concerns, the installation of large metal boxes throughout the community presents significant aesthetic issues that cannot go unaddressed. (Existing zoning regulations may in fact not adequately address such issues).

A news article covering AT&T's deployment of Project Lightspeed in Lodi, California, highlights the aesthetic and safety issues presented by the large 52B utility boxes:

> Julie and Sean Whiteley have a nickname for the hulking gray box in the front yard of their Grand Fir Drive home. But it's not an affectionate one.
>
> "We call it 'the refrigerator,' " Julie Whiteley said. "We were just talking about if we were going to hide it with landscaping." … AT&T has already approached Lodi about installing 10 boxes near apartment buildings, the start of its Project Lightspeed work in Lodi. The boxes AT&T proposes would be 5 feet 3 inches tall, 431/2 inches deep and nearly 21 inches wide and be placed in the public utility easement, typically 10 feet in from the sidewalk. ….
>
> AT&T spokesman Gordon Diamond said the company attempts to satisfy local officials' concerns about the boxes' location and looks. He said Lodi already has larger electric utility boxes in residential areas and that putting the cabinets underground would be cost-prohibitive. … "From the looks of it, they don't really make any effort to cover them up. I've seen more substantial wireless equipment stored in vaults underground. We're trying to protect ourselves from the eyesores."
>
> They're not just eyesores, according to Stuart Chapman, an Illinois telecommunications consultant whose firm has clients in 10 states, including California. Because they're installed near streets, the boxes - which he calls "an aesthetics nightmare" - could block motorists' view of potential hazards. [E]ach one is able to serve about 300 homes. With roughly 23,000 separate addresses, several dozen would be required throughout Lodi.[6]

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6 Jeff Hood, *Lodi Residents May Lose Yard Space to AT&T Cabinets*, THE RECORD, June 3, 2006, http://www.recordnet.com/apps/pbcs.dll/article?AID=/20060603/NEWS01/606030311/1001

As the passage above indicates, Project Lightspeed deployment does not involve the construction of merely one or two, or even a handful, of these large utility boxes. Rather, as each box can only serve about 300 Project Lightspeed subscribers, AT&T must deploy them in substantial numbers throughout the community to be served. In Burbank, California, for example, AT&T submitted 127 permit applications for encroachment relating to Project Lightspeed utility boxes.[7] The City of Geneva, Illinois estimates that AT&T would need to construct 22 to 29 of these large, above-ground boxes throughout the community.

It is also important to note that the City of Geneva's estimate about the number of Project Lightspeed boxes to be deployed throughout the community did not come from AT&T, despite the City's requests for such information:

> In Geneva, the city's concern started when AT&T applied to build four of its nodes in public right-of-way. AT&T first met with city officials March 9. Geneva officials asked for detailed information about Project Lightspeed, such as the size of the nodes, how many they would want to build in Geneva, the proposed area to be served by the project and what kind of overall plan AT&T has.
>
> Mary McKittrick, Geneva's assistant city administrator, said the company promised to return with information but never did. She likened it to a developer who would come in and ask to build a subdivision two building permits at a time, rather than submitting a subdivision plan. "Obviously, we would never do that," she said. "We need to see the big picture." This is one of the reasons Geneva asked for a temporary moratorium. "We just need a timeout to see what's going on," she said.[8]

The City of Geneva's difficulties in acquiring relevant information from AT&T is typical. In the Village of Roselle, Illinois, AT&T represented to the Village that its Project Lightspeed work was simply a run-of-the-mill upgrade of the existing telecommunications system, with little or no impact on the public right of way. AT&T did not even apply for a permit. In Wheaton, Illinois, AT&T applied for a permit for the installation of a few large utility boxes in the public right of way, but did not inform the City of Wheaton that it in fact intended to deploy a major new system – with substantial new facilities – throughout the community.

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7 http://www.ci.burbank.ca.us/agendas/ag_council/2006/sr071106_7Attachment.pdf.

8 Steve Lord, *Towns Want to See the Big Picture in New Technology*, AURORA BEACON NEWS, May 10, 2006.

In short, AT&T has been less than forthright and less than cooperative with local officials concerning its plans for the deployment of numerous, large facilities throughout the localities in question. AT&T has failed to act in good faith with regard to its local obligations, and its negotiation tactics have resulted in animosity.[9] In light of AT&T's demonstrated propensity to downplay the impact Project Lightspeed is likely to have on the communities, local governments rationally have been "on alert" with regard to AT&T's plans for Project Lightspeed in their communities. Anything less would be a disservice to their citizens.

The localities' moratoria are an appropriate – and temporary – response. AT&T's deployment of Project Lightspeed raises major issues for the Illinois Municipalities and local governments in general. As described in the previous section, AT&T seeks to construct substantial new facilities in the public right of way, with little clear indication from its representatives to City officials about the number facilities, their size, their frequency, or location. The number, size and location raises complex public safety and aesthetic questions, different in kind from the issues presented by the installation of a single or even a small handful of 52B-type utility boxes, or by the occasional installation of conventional traffic-control or electricity management facilities. In particular, based on the preliminary information available to the Illinois Municipalities about the scope of the planned deployment and the size of the facilities at issue, it is not at all clear whether or how AT&T will comply with zoning regulations in the various localities, nor whether the regulations are sufficient to properly protect the public's interest.[10]

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[9] For example, in Naperville, IL, "[a]n angry city council rejected [AT&T's] request … to offer the service without full build-out in the city after learning the company had reneged on several negotiating points previously agreed upon.... 'I'm very sorry I wasted my time meeting with AT&T,' Councilman James Boyajian said. 'I have not dealt with many companies that showed less integrity than AT&T on this thing and if this is the way they are going to do business, other municipalities better watch out.'" Jake Griffin, *Naperville Pulls Plug on Lightspeed,* DAILY HERALD, August 17, 2006 (*see* Exhibit 6.)

[10] By way of analogy, consider cell towers. When cellular technology was relatively new, and when the demand for cell towers began to rapidly expand, many municipalities passed moratorium ordinances to study the implications and to review the effectiveness of current zoning laws. Those moratoria did not spell doom for that technology, and provided the municipalities adequate time to evaluate the public impact of cellular tower construction, balanced against the need for cellular coverage, and in light of federal tower siting statutes. That planning process led to a largely a successful interaction between local government and cellular companies, and did not prevent or unduly delay the deployment of that technology.

The ability of local governments to enact moratoria is an important tool to aid in the reasonable management and planning of local resources. In the context of land-use planning (but with considerations equally applicable to the present situation), the U.S. Court of Appeals for the Ninth Circuit has stated:

> [T]he widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established tradition. Land-use planning is necessarily a complex, time-consuming undertaking for a community, especially in a situation as unique as this. In several ways, temporary development moratoria promote effective planning. First, by preserving the status quo during the planning process, temporary moratoria ensure that a community's problems are not exacerbated during the time it takes to formulate a regulatory scheme…. Given the importance and long-standing use temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism.

Tahoe-Sierra Preservation Council, Inc.v. Tahoe Regional Planning Agency, 216 F.3d 764, 777 (9th Cir. 2000), *reh'g en banc denied*, 228 F.3d 998 (9th Cir. 2000), *aff'd on other grounds*, 535 U.S. 302, 152 L. Ed. 2d 517, 122 S. Ct. 1465 (2002).

The moratoria ordinances[11] at issue here do not mention AT&T by name, but refer to permit applications submitted by AT&T seeking permission to install ground mounted utility installations ("GMUIs") on public ways.[12] They state that AT&T's proposed GMUIs are "significantly larger" than any prior GMUIs previously allowed, and that these larger GMUIs "present numerous issues not previously considered" by the municipalities with respect to zoning, public safety, welfare, and "franchising implications." The ordinances state that the municipalities need time to "more thoroughly evaluate" the impact the proposed installations may have. The

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11 The litigating municipalities adopted ordinances on the following dates, each of which establish 180-day moratoriums: City of Geneva – April 17, 2006; Village of Roselle – March 27, 2006; City of North Aurora – April 10, 2006; Village of Itasca – April 4, 2006; City of Wheaton – April 3, 2006.

12 It is important to note that the moratoria are temporary. AT&T has not alleged that any final local government decision has been taken that prohibits its deployment. Its conspiracy theories and its lawsuits stem from merely *temporary* moratoria; there has been no final action – and thus no *ultra vires* action – by localities. Nevertheless, AT&T's immediate reaction to the moratoria was not to continue working with the localities and participate in a productive debate, but, rather, to immediately file suit against the localities.

ordinances direct the staff of the municipalities to investigate the proposed installations to determine their impact on "public health, safety and welfare, and existing franchise agreements and ordinances."

The City of Geneva described its moratorium ordinance as follows: "This moratorium is a 'time out' to allow the city to review the overall scope of our rights of way and the impact private providers have on them from both aesthetic and public safety point of view. The City must be able to control where very large utility boxes are located and will not allow outside corporations to dictate what is best for the citizens of Geneva."[13]

The decision of the Illinois Municipalities to adopt moratoria to allow time to study the issue and to determine appropriate local zoning and other requirements was the correct action, particularly in light of localities' duties under local zoning ordinances to effectively manage the placement of facilities that may affect the community. For example, the zoning ordinance of the City of Wheaton, Illinois, states that its purpose is "to promote the public health, safety, morals, comfort, convenience and general welfare of the residents of the City of Wheaton; . . . To regulate and restrict the location and use of buildings, structures, and land for trade, industry, residents and other users, and to regulate and restrict the intensity of such uses . . . To prevent additions to and alteration for remodeling of existing buildings or structures in such a way as to avoid the restriction and limitation lawfully imposed hereunder; . . ." (underline added). *See* Exhibit 3.

In light of their obligations to protect their local residents and property owners, and the public rights-of-way, local officials have a *right* to obtain the relevant information and a *duty* to make the right decision from a planning perspective. Local moratorium ordinances are a valid and proper means to do so. To allow AT&T to undertake a massive system development in a completely self-interested mode would be to ignore these duties. AT&T, though, refuses to acknowledge these principles, and goes so far as to accuse the localities of anticompetitive action.

AT&T's planned video programming service probably is a "cable service" subject to local franchising requirements. In addition to the unprecedented impact on public safety and the public right of way presented by AT&T's Project Lightspeed plans, and for which the Illinois Municipalities' moratoria are well-justified, another issue also influenced the decisions by the Illinois Municipalities to adopt the moratoria ordinances. It is possible – perhaps even likely – that AT&T's Project Lightspeed system and its U-Verse video offering amounts to a "cable service," for which a franchise must be obtained in compliance with the federal Cable Act.

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13 http://www.geneva.il.us/genevamail.htm

Whether AT&T's U-Verse IPTV service is or is not a "cable service" is an unsettled question, but after thoroughly researching the issue, counsel for the localities have opined that the proposed video service probably is in fact a "cable service" within the meaning of the Cable Act, and is therefore subject to local franchising. (*See* Exhibit 1, Opinion Letter from Baller Herbst Law Group to City of Geneva, IL.)

Other major telecommunications companies across the country – including Verizon – are busily deploying major new fiber-based networks for the provision of video services. The outlier – AT&T – has adopted a very aggressive, very public position that its Lightspeed video programming service is not subject to local requirements. Other incumbent telecom providers that seek to offer video services, such as Verizon, have acceded to the requirements of the federal Cable Act and have acknowledged that an IPTV service is or will be treated as a "cable service" under federal law.[14] AT&T, however, repeatedly states its unilateral conclusion that Project Lightspeed is not a "cable service" subject to franchise requirements as if it were undisputed fact, when clearly it is not.

The Illinois Municipalities are certainly not alone in their conclusion. In Congress, the sentiment appears to be that AT&T's argument is without merit. Representative Barton went so far as to call it "stupido,"[15] and telecommunications reform legislation pending in the Senate appears to clarify that AT&T's U-Verse video service will be subject to franchise requirements.[16] While the Connecticut DPUC has, by a 3-2 vote, opined otherwise, that decision is being challenged in state and federal courts by the Connecticut Office of Consumer Counsel and other

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14 The incumbent telcos are united, however, in calling for state- and national-level franchises, as opposed to local franchises. Naturally, local governments have a vested interest in the outcome of that debate, but it is an issue beyond the scope of this letter.

15 Drew Clark, *House Panel Approves Telecom Bill; Rejects Democratic 'Buildout' Plan*, NATIONAL JOURNAL, April 5, 2006, http://www.freepress.net/news/14818. ("'Our friends at AT&T have sent this silly letter to Mr. Dingell [arguing that AT&T is not a "cable service"], which they shouldn't have done,' observed Barton, dubbing their argument 'stupido.'")

16 AT&T Inc.'s Internet-protocol-TV service would need to comply with video-franchising provisions in telecommunications legislation (S. 2686) sponsored by Senate Commerce Committee chairman Ted Stevens (R-Alaska). "They are not exempt," said a Senate staff member … "If there is any ambiguity in the language, we will modify it." Ted Hearn, *No Free Ride for AT&T in Stevens Bill,* MULTICHANNEL NEWS, June 6, 2006, http://www.multichannel.com/article/CA6345480.html.

parties.[17] AT&T might not agree with it, but when local governments conclude AT&T's IPTV service is a "cable service," they are not being obstructionist, they are making a reasoned and well-supported decision.

AT&T also suggests in its May 24 letter that, even if the facilities it deploys are designed to deliver video programming, and even if it clearly intends to offer such video programming (in short, that it is a "cable service"), the localities are powerless to insist on a franchise until AT&T does, in fact, offer such video programming. Until that time, so AT&T's argument goes, AT&T may do what it wishes in terms of cable system deployment within the public right of way, immune from the various local protections and conditions that are normally included in a cable franchise. To the contrary, the Cable Act's franchise requirements were intended to provide local governments the ability to protect the public health, safety and welfare, and the reasonable use of public rights of way, *while the network is being constructed.* Under AT&T's logic, a cable company overbuilder could enter the market and deploy hybrid fiber-coax facilities in the public right of way, without being subject to any franchise-related obligations whatsoever until video services are in fact offered. If the hypothetical cable company simply insisted that it was merely offering cable modem service, it would presumably be immune from such important considerations as build-out requirements, public safety assurances, local accountability, bonding, insurance, and other crucial protections that are typically included as part of a local franchise. Those principles are the very reason a franchise requirement exists.

The Municipalities must comply with the Illinois "level playing field" statute. Another crucial factor facing the Illinois Municipalities is the presence of an Illinois "level playing field" statute. *See* § 65 ILCS 5/11-42-11(e) (Exhibit 2). Should a locality allow AT&T to deploy a cable service without insisting on a franchise at all, and, particularly, a franchise that contains terms not more favorable nor less burdensome than that held by the incumbent cable provider, the incumbent cable provider can and probably would file suit against the locality. The localities have been presented with a Hobson's Choice of either enforcing franchising requirements against AT&T as a "cable service," or of running afoul of state and local level playing field requirements by enabling AT&T to offer cable service without a franchise at all. As a Comcast area vice president recently stated: "The phone company's recent claims to the contrary notwithstanding, the only thing keeping it from very quickly entering the video market – as it has done before – is its unwillingness to play by the same rules

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17 Linda Haugsted, *AT&T Conn Franchise Fight Heads to Court*, MULTICHANNEL NEWSWIRE, July 20, 2006, http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA6355023.

as everyone else, meet some basic community needs, and sign a contract that will make its investment promises enforceable."[18]

Indeed, AT&T has admitted as much, absolutely refusing to even negotiate the point. A recent letter from AT&T's regional Vice President, Mark Blakeman, to the Metropolitan Mayors Caucus stated: "A build-out requirement related to IP video is one such term about which AT&T will not negotiate."[19]

It is reasonable and fair for local governments to work together on important issues. AT&T in its May 24 letter implies that the localities are, for some reason, ganging together to pick on AT&T. AT&T insists that the localities inexplicably have a "strategy" to "stop" AT&T, and that their action "threatens to stop wireline video competition dead in its tracks." Specifically, rather than recognize the Metropolitan Mayors Caucus for what it is – an organization including all 274 localities in the Chicago area, and whose work is diverse and wide-ranging – AT&T finds a "concerted campaign" by "interest groups" to "block" AT&T from deploying competitive video services.

The localities certainly are sharing information, as localities with common interests often do (and which localities often *must* do, to effectively represent their constituents). In fact, we urge the Commission to review the Toolkit provided by the Metropolitan Mayors Caucus, which AT&T included with its May 24 letter to the Commission. Far from being the text of an agenda-laden "interest group," the Toolkit is in fact a reasonable set of practical advice for municipalities confronted with the many issues surrounding the deployment of facilities for IPTV-based cable service within their boundaries.

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As described above, AT&T's May 24 *ex parte* letter to the FCC dramatically mischaracterizes the current impasse between AT&T and the Illinois Municipalities who jointly submit this letter. It is crucial that the FCC be made aware of the local governments' perspective in this matter.

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18 Leigh Ann Hughes, *Phone Company Plays Unfairly,* KANE COUNTY CHRONICLE, August 13, 2006 (s*ee* Exhibit 4).

19 *See* Exhibit 5.

For the Illinois Municipalities,[20]
The Baller Herbst Law Group
/s/ Adrian E. Herbst
Jim Baller
Casey Lide

cc: Donna Gregg
Rosemary Harold
William Johnson
Deborah Klein
Natalie Roisman
Tom Navin
Julie Veach
Susan Aaron
Illinois Municipalities

[20] The City of Geneva, City of North Aurora, City of Wheaton, City of Wood Dale, Village of Carpentersville, Village of Itasca, and the Village of Roselle join in this letter.

EXHIBIT 1

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PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT MEMORANDUM

To: Peter Collins, City of Geneva

From: Jim Baller and Casey Lide

Date: March 26, 2006

Re: AT&T Lightspeed Franchise Requirements

Introduction

The City of Geneva has asked for our opinion as to whether federal and the City's own cable franchise requirements apply to AT&T's proposed Internet Protocol television service (IPTV) known as "Lightspeed."[1] As you are aware, federal law states that all providers of "cable service" over a "cable system" must obtain a local franchise. AT&T maintains that Lightspeed is not subject to federal or local cable franchising requirements. This has resulted in contentious debates at the federal, state, and local levels across the United States. Notably, in contrast to Verizon,

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[1] We refer to AT&T and its predecessor, SBC, interchangeably in this memorandum. The term "Lightspeed" is more difficult to define precisely. *See* Richard Shim & Jim Hu, "SBC Goes Public With 'U-Verse' TV Plan," CNET News, Jan. 6, 2006, http://news.com.com/SBC+goes+public+with+U-verse+TV+plan/2100-1034_3-5515670.html. According to AT&T's public relations materials, the term encompasses not only IPTV, but also AT&T's Voice over Internet Protocol (VoIP) and broadband Internet services. In some contexts, "Project Lightspeed" may also refer to AT&T's network upgrade program or to the network itself. Recent reports indicate that AT&T's converged IP-based services – including voice, video and broadband Internet access – will be marketed as "U-Verse."

which complains about local cable franchising but has entered into dozens of local cable franchises, AT&T has to date adamantly refused to enter into any local cable franchise for Lightspeed.

Complicating matters further, the issues that you have raised have arisen against the backdrop of tremendous upheaval in many of the legal, technological, financial, marketing, and other considerations on which communications policy has been based in America for the last seven decades. Of particular relevance here, Congress, the FCC, state public service commissions, local governments, and the courts have all been considering how best to classify services provided over Internet Protocol (IP), and the major telephone companies (telcos), cable operators (cablecos), local governments, consumer groups, and other stakeholders have all been working diligently to preserve and protect their interests. As a result, dramatic changes to the communications laws may – or may not – occur over the next few months, in ways that no one can predict with a high degree of confidence.

In this memorandum, we will not address the pros and cons of local cable franchising. To do that well would take a paper many times the length of this one. Rather, we will base our analysis and conclusions on the law as it exists today. On that basis, we believe that AT&T's Lightspeed service is subject to local cable franchising and that the Illinois "level playing field" law arguably requires the City to impose such requirements on AT&T.

* * *

In Part I, we begin our analysis with a review of the salient characteristics of the Lightspeed service, based AT&T's own statements and trade press reports. In Part II, we review AT&T's arguments against obtaining cable franchises. In Part III, we apply current federal and local cable law to the Lightspeed video service and respond to AT&T's main arguments. In Part IV, we review developments in other localities that are facing this question. In Part V, we summarize our main conclusions.

I. CHARACTERISTICS OF LIGHTSPEED VIDEO SERVICE

Over the last few years, a wide consensus has emerged on the point that the Internet is a technology of tremendous significance and opportunity for the United States. A sizable number of federal, state, and local officials have also come to believe that the Internet should not be regulated at all, or, at most, should be regulated with a "light touch." Seeking to take maximum advantage of this sentiment, SBC, and now AT&T, have repeatedly sought to portray the video component of Project Lightspeed as an advanced, Internet-based form of video technology that cannot, or should not, be regulated.

For example, in comments filed with the Federal Communications Commission (FCC) on September 14, 2005, SBC stated:

> Even though some features of IP-enabled video will have the look and feel of standard cable services (much like voice-VoIP resembles circuit-switched telephony in some ways), the service predominantly is something else. SBC's service involves interactive features that go far beyond those "required" simply to access channels. It is designed ultimately to permit all end users to tailor much of the content and viewing experiences, or engage in transactions. Project Lightspeed video, and the fuller suite of IP-enabled services of which it is a part, ultimately is designed to permit end users to connect to the Internet, access stored files such as email, voicemail, or directory information, route communications, and use their television sets to aggregate content and screen calls in a manner customized to the end user's preferences. Indeed, SBC's IP-enabled video service is designed to place the subscriber at the command center of a sophisticated array of services and content that can be manipulated and individualized to meet the tastes and needs of each individual member of the subscriber's household. Such interactivity clearly was outside the bounds of what Congress considered "cable service" in the 1984 Cable Act or in the Act's subsequent amendments.[2]

Later in the same paper, AT&T stated that its Lightspeed video service

> will enable subscribers to (1) select different camera angles or audio feeds; (2) request additional content of particular interest to them, including "converged" Internet-sourced content that the customer can view and interact with on a real time basis while watching video programming content, such as obtaining sports score updates on screen from a secure network location with Internet-sourced data while a game is in progress; (3) use enhanced "picture-in-picture" and "mosaic" features for simultaneous viewing of multiple video streams; and (4) interact with "triggers" in video streams that would allow customers to vote in news polls and have collated voting data appear on screen in real time.[3]

In the statements quoted above, AT&T did not clearly distinguish between the video services that it plans to roll out now and the video services that it hopes to roll out at some unspecified time in the future. According to the media and AT&T's future competitors, however, that is an important distinction.

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2 *In the Matter of IP-Enabled Services...* WT Docket No. 04-36, Comments of SBC Corporation, at 17, filed *ex parte* September 14, 2005 ("*SBC Ex Parte Comments*") (footnotes omitted).

3 *Id.* at 20.

For example, at the time that AT&T launched Project Lightspeed in San Antonio at the end of December 20005, the press reported that AT&T was essentially mirroring traditional cable service by offering "200 channels, including many of the popular or premium channels such as HBO, MTV, ESPN, the Discovery Channel, and the Disney Channel, among others."[4] Similarly, in a paper filed with the FCC, Comcast characterized AT&T's Lightspeed video service as follows:

> Shorn of all the hyperbole about features and functions that may 'ultimately' or 'eventually' be offered, the video service AT&T has described (it is not yet commercial available on any significant scale) looks, walks, and quacks like the cable services that Comcast and other cable operators provide today. Even AT&T has admitted that its video service will 'have the look and feel of standard cable services.'
>
> Stated simply, AT&T will combine linear and on-demand video programming choices just like those found on other digital cable systems, including Comcast's and Verizon's. ... The customer experience in surfing channels on the AT&T system will be no different than the customer's experience on a typical cable system. When the viewer pushes the channel change button on the remote, the new channel is what will be delivered to the viewer's TV set.[5]

To elaborate on Comcast's last point, traditional cable systems transmit their entire channel lineups throughout their networks and require subscribers to select channels through the use of addressing equipment at their residences. When a subscriber selects a program on his remote-control clicker or a button on his television or set-top box, his addressing equipment accesses the program that he has selected. Project Lightspeed will achieve the same result with a different technology.

AT&T does not plan to replace the twisted-pair copper wires in the "last mile" between neighborhood nodes and subscriber homes. As a result, AT&T will have limited bandwidth capacity to allocate among telephony, standard cable television, high definition television, high speed Internet, and other emerging high-bandwidth applications. Project Lightspeed is designed to conserve AT&T's limited bandwidth capacity by using "switched" technology to transmit only the specific program that

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4 "AT&T Makes TV Debut," Red Herring, January 5, 2006, http://www.redherring.com/Article.aspx?a=15172&hed=AT%26amp%3BT+Makes+TV+Debut%C2%A7or=Industries&subsector=EntertainmentAndMedia.

5 *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 . . .,* MB Docket No. 05-311, ("*Local Franchising Proceeding"),* Comments of Comcast Corporation, at 20, filed February 13, 2006.

the subscriber selects. To speed the process, AT&T will store copies of available programs in regional or national caches.

To visualize the difference between the cable industry's and AT&T's approaches, imagine two Chinese Dim Sum restaurants serving identical selections through different delivery mechanisms. In the cable industry's restaurant, customers make their selections from carts that are constantly circulating around the room. In AT&T's restaurant, customers give their orders to a waiter, who goes to the kitchen and brings only the items selected to the customer's table. One may debate the relative merits of these delivery mechanisms, but in either case, the customer receives the same meal.

II. AT&T'S POSITION ON LOCAL CABLE FRANCHISING

AT&T has adopted the hard-line position that its Lightspeed service does not require a local franchise under federal law. As Comcast stated in recent comments to the FCC: "To the best of our knowledge, AT&T has refused to apply for a single local cable franchise anywhere in the country. Rather, AT&T has persisted in the strained view that the service it plans to deploy will not qualify as a cable service and therefore will not be subject to local franchising requirements."[6]

A recent trade press article reported:

> Jeff Weber, SBC vice president for product and strategy, for the first time articulated the depth of the carrier's commitment to a no-franchise policy in an interview at SUPERCOMM. "We don't believe we need a cable franchise, and we don't intend to seek any," he said. He said the carrier believes its case that IPTV is an information service, not a cable service, is strong enough to withstand any legal challenges and is willing to take its chances in the courts rather than wait for the legal issues to sort themselves out in Congress or at the FCC. Asked how SBC would react to a legal clarification that declared cable franchise rules under Title VI of the Telecom Act must be applied to IPTV, Weber replied, "If the rules are clarified to say we have to have a franchise it will put an absolute chilling effect on our plans."[7]

The *ex parte* comments that SBC filed with the FCC on September 14, 2005, shed further light on its rationale.[8] In these comments, SBC said that "IP-enabled video services are not and should not be subject to the legacy requirements of Title VI";

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6 *Local Franchising Proceeding,* Comments of Comcast Corporation, filed February 13, 2006, at 18.

7 Fred Dawson, "SBC Official Clarifies Stand on Franchises and Launches," XChange, June 9, 2005, http://www.xchangemag.com/tdhotnews/56h914333643010.html

8 SBC *Ex Parte* Comments in *IP-Enabled Services,* filed September 14, 2005.

that "the services offered over SBC's Project Lightspeed network will not be 'cable services' provided over a 'cable network' as those terms are defined in Title VI"; and that a finding that Project Lightspeed is not subject to cable regulation was consistent with the FCC's rationale in *Vonage Holdings*,[9] in which the FCC had found that Voice over Internet Protocol should not be subject to "multiple disparate" regulatory regimes from "more than 50 different jurisdictions."[10] SBC then added,

> The cable franchise provisions apply specifically to 'cable operators' that provide 'cable services' over 'cable systems.' Those three key terms, moreover, are defined very precisely by reference to particular technologies and system architectures used to distribute video programming. Thus, cable service is limited to 'one way transmission' of video programming to subscribers, 'cable systems' are limited to transmission facilities designed to provide such one-way transmissions, and 'cable operators' are narrowly defined as providers of such service using such systems.
>
> IP-enabled video services quite clearly fall outside the legal framework bounded by these distinctly defined terms. Legacy cable systems are inherently one-way closed transmission systems, designed to broadcast all video channels simultaneously to every household and business connected to those systems. In contrast, advanced broadband networks used to deliver IP-enabled video services, such as SBC's Project Lightspeed, are two-way networks that involve regular communication and interaction with customers in the delivery of video services, and are based on a client-server architecture similar to the architecture used by customers to access the Internet. In that architecture, and in contrast to a traditional cable system, a customer's set-top equipment must be in constant communication with the network. Moreover, these switched, point-to-point, IP networks are purposefully designed and ultimately capable of allowing customers to access a wide variety of video and other content on an on-demand basis.
>
> Accordingly, based on the specific terms of the Cable Act, it is a relatively straightforward determination that, as a legal matter, IP-enabled video networks such as Project Lightspeed are not 'cable systems' designed to provide 'cable services' and are thus not subject to the legacy cable regulations in Title VI that apply to 'cable operators.'

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9 Vonage Holdings Corporation, *Memorandum Opinion and Order*, 19 FCC Rcd 22404, 22416-17 ¶ 20 (2005) ("*Vonage Order*").

10 SBC *Ex Parte* Comments at 3.

In the following section, we examine the rules and regulations to which SBC refers in this passage and conclude that AT&T's interpretations are unpersuasive and probably wrong.

III. LEGAL ANALYSIS

How Lightspeed video service will ultimately be classified under federal law is an open question at this point. The FCC is considering the issue in its pending *IP-Enabled Services Proceeding*, and so is the federal district court in the *Walnut Creek* case in California (see Section V below. For present purposes, however, we look to the current state of the law and conclude that AT&T is a "cable operator" subject to the federal requirement that a cable operator must obtain a local cable franchise before providing cable service in the geographic area at issue.

A. Cable Franchise Requirements Under Federal law

Section 621(b)(1) of the Communications Act, 47 U.S.C. § 541(b)(1), states that "a cable operator may not provide cable service without a cable franchise." The term "franchise" is defined in Section 602(9), 47 U.S.C. § 522(9), as including "an initial authorization … issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system."

The term "cable operator" is defined in Section 602(5), 47 U.S.C. § 522(5) as:

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operations of such a cable system.

The aspects of the "cable operator" definition concerning ownership and control of a system do not appear to be at issue, so whether AT&T is subject to local video franchising obligations will depend primarily on whether its Project Lightspeed video service is a "cable service" provided over a "cable system" as each of these terms is defined under the Cable Act.[11]

1. "Cable service"

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11 As Project Lightspeed does not appear to raise any significant ownership and control issues, it is unnecessary to address the ownership and control issues posed in *City of Chicago v. ECI,* 199 F.3d 424, 431 (7th Cir. 1999) and *City of Austin v. Southwestern Bell Video Services* (SVBS), 193 F.3d 309 (5th Cir. 1999).

The scope of the term "cable service" appears to be the most crucial part of the inquiry pertaining to the franchise requirements of Lightspeed video service. As defined in Section 602(6), 47 U.S.C. § 522(6), and identically in Section 3 of the draft Geneva Cable Communications Ordinance that you have provided to us, the term "cable service" means:

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming, and
>
> (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

These definitions, in turn, pose three subsidiary issues: (1) does the Lightspeed video service constitute or at least include "video programming; (2) do the interactive aspects of the Lightspeed video service mean take the service outside the scope of "one-way transmission," and (3) does the subscriber interaction envisioned by AT&T exceed that "required for the selection or use of such video programming." We believe that the answers to all three questions point to in direction of treating AT&T's video service as a "cable service" within the meaning of federal and local law.

a. "video programming"

The term "video programming" is defined in Section 602(20), 47 U.S.C. § 522(20), as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." As indicated, AT&T acknowledged in *ex parte* comments to the FCC that Lightspeed video service initially "will have the look and feel of standard cable services."[12] In fact, elsewhere in those comments, AT&T flatly admitted that the Lightspeed video service will qualify as "video programming:"

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12 SBC *Ex Parte* Comments, at 17.

> Certain of the content offered in connection with the IP-enabled video service that SBC will offer, for instance, will likely qualify as "video programming", *i.e.*, "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." Accordingly, *in offering its IP-enabled video service, SBC, for one, will be a multichannel video programming distributor ("MVPD"), which is defined as "a person ... who makes available for purchase, by subscribers or customers, multiple channels of video programming.*[13]

b. "one-way transmission"

The term "one-way transmission" is not defined in the Cable Act. According to the FCC, the term

> ... reflects the traditional view of cable as primarily a medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers. When the definition was enacted in 1984, cable systems designed for the traditional one-way delivery of programming were developing the capability to provide 'two-way' services, such as the transmission of voice and data traffic, and transactional services such as at-home shopping and banking. The legislative history indicates that Congress intended the cable service definition "to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation ... and all other communications services that could be provided over a cable system. Thus, the definition reflected the traditional view that the one-way delivery of television programs, movies, and sporting events is not a traditional common carrier activity and should not be regulated as such.[14]

The Lightspeed video service at issue here – i.e., the service that AT&T is *actually going to provide* rather than the service that it *may* provide at some unspecified time in the future – involves the delivery of television programs, movies, sporting events, and the like, in one direction, from AT&T to the subscriber. The subscriber's only activity will be to select the content through a remote control

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13 *Id.* at 12 (our emphasis added).

14 *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* FCC 02-77, Internet Over Cable Declaratory Ruling, ¶ 61 (March 14, 2002)("*Cable Modem Ruling*"), *aff'd*, *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Services. Inc.*, 125 S.Ct. 2688, 2005 U.S. LEXIS 5018.

device or a button on his television or set-top box. There is nothing two-way about this. The FCC's interpretation "one-way transmission" does not support the argument that AT&T's Lightspeed video service is different from other cable services because of its reliance on a non-traditional client-server architecture for program selection.

Moreover, common practice in the cable industry today argues against treating Lightspeed video service as though it involved "two-way transmission." That is, cable operators now routinely provide cable modem service along with traditional cable programming, but no one seriously argues that the provision of cable modem service somehow turns the provision of traditional video programming into a two-way service.

AT&T's arguments might have greater validity in the future, if its vision of integrated two-way services ever materializes. For now, however, these arguments do not work.

c. "subscriber interaction"

The term "subscriber interaction" is not defined in the Cable Act, but the FCC has dealt with it on numerous occasions. In fact, over the last fourteen years, the FCC has repeatedly discussed the relationship between the "subscriber interaction" and "video programming" language in the definition of "cable service."

Between 1992 and the enactment of the Telecommunications Act of 1996, in its video dialtone orders, the FCC dealt with many of the same issues that AT&T has resurrected today. At the time, the Communications Act had a "cable-telco cross-ownership prohibition," and the FCC sought to find a way to enable telephone companies to enter the cable business without violating the ban. The FCC ultimately did so by distinguishing between the basic video programming, which telephone companies could not provide, and subscriber interaction services, which telephone companies could provide if they could sever such services from the video programming itself.

Thus, in its first video dialtone order, the FCC observed,

> [T]he mere inclusion of some interactive capability would not be sufficient to transform other video programming into non-video programming and thereby escape the statutory cross-ownership ban. … For example, the inclusion of capability to choose among several camera angles of a video sporting event would not permit the telephone company to also provide the underlying video programming. Similarly, offering the consumer the capability to replay portions of a video program in slow motion or to fast forward will also not alter the

> conclusion that the underlying material constitutes prohibited video programming. The telephone company could, however, provide the functionality [to a provider of video programming] that would allow the customer to engage in such manipulation of and interaction with the video programming.[15]

Two years later, the FCC reaffirmed the conclusions summarized in the preceding paragraph and went on to say,

> We also reject BellSouth's contention that video-on-demand content is not severable from the interactive components of video-on-demand service. While consumers may, through features such as fast-forward and rewind, alter the images that they view, there is no reason why the telephone company cannot identify and sever the underlying program in its unaltered state. Moreover, contrary to BellSouth's claim, we do not believe that the level of subscriber control over video-on-demand images is such as to render the service more comparable to a gateway service than a traditional video programming service.[16]

More recently, the FCC observed in its *Cable Modem Ruling*:

> [T]he definition [of "cable service"] specifically contemplates some subscriber interaction. The definition enacted in 1984 provided for "subscriber interaction, if any, which is required for the selection" of content, so that cable service includes subscribers' ability to select video programming and information provided in other non-video programming services. The legislative history states that Congress intended 'simple menu-selection' or searches of pre-sorted information from an index of keywords that would not activate a sorting and 'would not produce a subset of data individually tailored to the subscriber's request' to be cable services. On the other hand, offering the capacity to engage in transactions or off-premises data processing, including unlimited keyword searches or the capacity to communicate instructions or commands to software programs stored in facilities off the subscribers' premises, would not be.

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15 *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58*, 7 FCC Rcd 5781; 1992 FCC LEXIS 4783, at ¶ 76 n.195 (rel. August 14, 1992).

16 *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service*, 10 FCC Rcd 244; 1994 FCC LEXIS 6818, at ¶ 11 (rel. November 7, 1994).

Cable Modem Ruling, at ¶ 64.

The lesson to be gleaned from these statements appears to be that even a high degree of complex subscriber interaction will not remove a service from the definition of "cable service," unless the video programming and the interactive service(s) cannot be segregated from each other. Segregation is clearly possible here; indeed, AT&T will probably offer its form of traditional cable service on a stand-alone basis even after introducing the advanced services that it touts. As a result, we believe that AT&T's initial offering is a "cable service," and some or all of the more advanced Lightspeed service is likely to continue to be a "cable service."[17]

For all of the foregoing reasons, we believe that AT&T's Lightspeed video service qualifies as a "cable service" under federal law. For the same reasons, we believe that the service also qualifies as a "cable service" under the identical definition of that term in Geneva's proposed cable ordinance.

2. "Cable system"

The next part of the inquiry, under 47 U.S.C. § 541(b)(1), is whether the Lightspeed "cable service" is provided over a "cable system." The definition of "cable system" under federal law has two parts. One part affirmatively defines what a cable system is; the other part specifies a number of exclusions.

Affirmative definition. The first part of the definition provides that the term "cable system" means:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community.

Section 602(7), 47 U.S.C. § 522(7).

The FCC has found that Congress meant the term "closed transmission paths" to distinguish between wireline systems and radio or microwave systems. According to the FCC, "facilities must be interconnected by physically closed or shielded

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17 We are puzzled by AT&T's reliance on the FCC's treatment of VoIP. In *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* WC Docket No. 02-361, Order, 19 FCC Rcd 7457, at ¶ 13 (2004), the FCC rejected AT&T's petition for a declaratory ruling that AT&T's VoIP service is an unregulated "information service," observing that "[w]e are not persuaded by arguments that AT&T's specific service is an information service due to its future potential to provide enhanced functionality and net protocol conversion." The FCC also noted that it would revisit this decision if AT&T's service ever evolved into something different from what it was at the time of the decision. *Id.*

transmission paths to meet the statute's threshold requirement for a cable system. Use of radio or infrared transmissions alone does not meet this threshold criterion." *In Re Definition of a Cable Television Sys.,* FCC 90-340, 5 F.C.C.R. 7638, 7642 (1990); *Beach Communications, Inc. v. FCC,* 959 F.2d 975 (D.C. Cir. 1992), *rev'd on other grounds, FCC v. Beach Communications,* 508 U.S. 307 (1993).

The term "signal generation, reception and control equipment" refers to headend facilities of the kind commonly used by cable service providers, and the term "designed to provide cable service" refers to any system capable of delivering video programming to subscribers. The term "subscriber" means "a member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it." 47 CFR § 76.5(ee).

AT&T argues that Lightspeed is not delivered over a "cable system" because the definition of that term requires that the facility be "designed to provide cable service."[18] According to AT&T, since Lightspeed is not a "cable service," there can be no "cable system." For the reasons discussed above, we believe Lightspeed video service is in whole or in part a "cable service," particularly in its current form. Because AT&T is unquestionably designing its system to provide that service, its system meets the affirmative definition of "cable system."

Exceptions. The second part of the definition of "cable system" sets forth a number of significant exceptions. The term "cable system" does *not* include:

> (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations [MMDS exception];
> (B) a facility that serves subscribers without using any public right-of-way;
> (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system ... to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;
> (D) an open video system that complies with section 573 of this title; or
> (E) any facilities of any electric utility used solely for operating its electric utility system.

47 U.S.C. § 522(7)(emphasis added). Two of the above exemptions are potentially relevant in the current context – (B) and (C).[19]

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18 *IP-Enabled Services,* SBC Comments, at 23.

19 Exemption (A) is not applicable because AT&T's Lightspeed video service goes well beyond the narrow scope of that exemption. Exemption (D) is inapplicable because AT&T will not be operating an open video system, which would require it to make substantial channel capacity

"Private cable" exception. Clause (B) sets forth what is commonly known as the "private cable exception." Invoking this exception, AT&T maintains that it is not subject to local franchise requirements because the video service ostensibly uses facilities for which it already obtained permission to operate in the public right-of-way:

> "[N]ew services can be offered simply by changing the pattern of signaling sent over an existing physical transmission facility, *without imposing any additional burden on rights-of-way*, and therefore no franchise is necessary."[20]

AT&T's reliance on this exception is unwarranted. First, as the experience of several other localities has made clear, the deployment of Lightspeed services involves far more than simply "changing the pattern of signaling."[21] Rather, experience has proven that there is, in fact, likely to be a substantial additional burden on the public right of way.

Second, simply because the Lightspeed video service may be provided over some preexisting facilities does not mean that the service is provided "without using any public right-of-way." Even if the service added no additional burden to the public rights of way – which is factually incorrect – it would still "use" the public rights of way. The "private cable exception" has not been interpreted to provide an exception for providing video service via an upgrade of an existing network.

Third, AT&T's suggestion that additional uses of existing facilities cannot result in additional burdens on the user is refuted by the long-standing principles and practices – presumably including AT&T own practices – involving pole attachments. Under the federal Pole Attachment Act, 47 U.S.C. § 224, a cable operator that uses pole attachments solely to provide cable and broadband service is subject to the FCC's "cable rate" formulas, which provide for relatively low maximum pole attachment rates. If a cable operator adds telecommunications service to the mix, without increasing the burden on existing facilities in any way, it becomes subject to the FCC's "telecommunications rate" formulas, which can result in pole attachment rates that are 2-3 times higher than the rates calculated under the "cable rate" formulas. As a pole owner that is subject to the Pole Attachment Act,

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available to other parties on a common carrier basis. Exemption (E) does not apply because AT&T is not an electric power company.

20 http://msnbc.msn.com/id/11586943/

21 Attached to this memorandum is a photograph taken by Gary White of Wheaton, Illinois, that dramatically illustrates how intrusive AT&T's new facilities will be in the public rights of way and in private easements. The man in the picture is 5'9" tall. Cabinets of this size will reportedly be placed every 3000 feet, creating the potential for considerable public dissatisfaction as well as public safety issues.

AT&T has presumably benefited – perhaps greatly – from the FCC's distinction between pole attachments used for cable/broadband services and pole attachments used for telecommunications services.

"Interactive on-demand" exception. The second relevant exception in the definition of "cable system" is clause (C), which excludes from the definition of "cable system" "a facility of a common carrier ... except that such facility shall be considered a cable system ... to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services." AT&T also insists that Lightspeed fits within that exception:

> [T]he Act specifically provides that a telephone company's facilities would not qualify as a cable system when used solely for "interactive on-demand services." The Act defines an interactive on-demand service as "a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider." This definition "has virtually no legislative history explaining its intent or meaning."
>
> As explained above, Project Lightspeed is a switched, point-to-point network that will allow each subscriber to interact directly with the network and select specific programming, which the network then transmits to that particular subscriber. This is in contrast to the much less efficient point-to-multipoint broadcast-like transmissions employed by incumbent cable operators, which simultaneously send all their channels to all subscribers' homes at once, and rely on set top equipment to allow each household to view those channels it has selected.
>
> In the end, SBC's purpose in deploying this point-to-point, two-way network is to provide subscribers with maximum flexibility in customizing what they see and when they see it. This type of IP-enabled network will be unique in its ability, ultimately, to untether subscribers from the confines of a programmer's pre-set schedule. And, while the ultimate breadth and scope of such on-demand capabilities will be a function of a number of factors, including arrangements with content owners and other programming vendors, the key is that SBC's Project Lightspeed entails an infrastructure that will include the capabilities to satisfy the interactive on demand exclusion found in the Cable Act.[22]

According to Comcast, this argument is "laughably erroneous."[23] While a purely point-to-point on-demand service could arguably qualify as an exempted "interactive on-

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22 *IP-Enabled Services,* SBC Comments, at 24-25.

23 Comcast Comments, *Local Franchising Proceeding,* at 20.

demand" service, AT&T's description above is, at this point, purely hypothetical. As discussed above, AT&T has flatly admitted that the Lightspeed video service will for the foreseeable future resemble a traditional cable service, with traditional cable programming and traditional programming schedules. There may be on-demand content available (much like existing cable providers), but the service quite clearly does and will "include services providing video programming prescheduled by the programming provider." Thus, Comcast concludes, "So long as AT&T wishes to offer consumers the option to view linear broadcast and cable networks – all of whose programming is scheduled by the program provider – the exclusion for 'interactive on-demand service' plainly does not apply." [24]

B. Cable Franchising Requirements Under Local Law[25]

Apart from the requirement in Section 621 of the Communications Act that providers of "cable service" first obtain a cable franchise, the City arguably possesses an independent basis for requiring AT&T to do so before providing cable service within the City. As the United States Court of Appeals for the Fifth Circuit recognized in *City of Dallas v. FCC,* 165 F.3d 341, 348 (5th Cir. 1999), "the legislative history accompanying the 1984 Cable Act suggests that franchising authority does not depend on or grow out of § 621. While § 621 may have expressly recognized the power of localities to impose franchise requirements, it did not *create* that power."

In Illinois, municipalities of the State are authorized to franchise community antenna television services pursuant to the Illinois Compiled Statutes Chapter 65, Section 5/11-42-11 *et seq.* Pursuant to that authority, the City has drafted a proposed franchise for the City, which the City Council will soon consider for adoption. In the proposed franchise ordinance, the definitions of "cable service" and "cable system" are identical to the definitions in the federal Cable Act, and the statutes of Illinois define "cable operator" solely by referencing the federal definition.[26] While interpretations of the federal definitions would presumably have a significant impact on the City, it does not necessarily follow that the City is bound by the interpretations of federal law. Should that become an issue, we recommend that the City seek the advice of local counsel.

C. "Level Playing Field" Considerations

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24 *Id.*

25 The Baller Herbst Law Group is not licensed to practice Illinois law. We understand that our role here is to advise the City on federal law and to offer suggestions, for the benefit of the City and its local counsel, on how to analyze pertinent provisions of local law. We understand that, on matters of State and local law, the City will ultimately rely on the advice of Illinois counsel.

26 65 ILCS 5/11-42-11(e)(iv).

In determining whether and to what extent the City should seek to impose cable franchise requirements on AT&T with respect to the Lightspeed video service, the City must also be mindful of the state's detailed "level playing field" (LPF) statute,[27] which is codified at 65 ILCS 5/11-42-11(e). Because of its potential significance, we quote the key provisions below and included the entire section in the Appendix.

Subsections (4) and (5) of 65 ILCS 5/11-42-11(e) state, with emphasis added:

> (4) ... Except as provided in paragraph (5) of this subsection (e), *no such additional cable television franchise shall be granted under terms or conditions more favorable or less burdensome to the applicant than those required under the existing cable television franchise*, including but not limited to terms and conditions pertaining to the territorial extent of the franchise, system design, technical performance standards, construction schedules, performance bonds, standards for construction and installation of cable television facilities, service to subscribers, public educational and governmental access channels and programming, production assistance, liability and indemnification, and franchise fees.
>
> (5) Unless the existing cable television franchise provides that any additional cable television franchise shall be subject to the same terms or substantially equivalent terms and conditions as those of the existing cable television franchise, the franchising authority may grant an additional cable television franchise under different terms and conditions than those of the existing franchise, in which event the franchising authority shall enter into good faith negotiations with the existing franchisee and shall, within 120 days after the effective date of the additional cable television franchise, modify the existing cable television franchise in a manner and to the extent necessary to ensure that neither the existing cable television franchise nor the additional cable television franchise, each considered in its entirety, provides a competitive advantage over the other, . . .

65 ILCS 5/11-42-11(e)(4)-(5).

Throughout this memorandum, we have included statements by Comcast criticizing AT&T's arguments against subjecting the Lightspeed video services to local franchise requirements. If the City does *not* require AT&T to obtain a franchise for the delivery of video programming, Comcast may well sue the City for failing to do so. Furthermore, even if the City does insist that AT&T obtain a cable franchise,

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[27] State and local level playing field statutes are routinely enforced, and as a general matter are not preempted by federal law. *See, e.g., Cable TV Fund 14-A v. Naperville,* (N.D. Ill. 1997).

Comcast is likely to insist that AT&T's franchise be no more favorable or less burdensome than Comcast's franchise.[28]

In addition, the Illinois level playing field statute obligates franchising authorities to comply with various procedural requirements as it issues a competitive franchise.[29] At the same time, however, the statute provides immunity to a municipality that follows these procedures: "No municipality shall be subject to suit for damages based upon the municipality's determination to grant or its refusal to grant an additional cable television franchise, provided that a public hearing as herein provided has been held and the franchising authority has determined that it is in the best interest of the municipality to grant or refuse to grant such additional franchise, as the case may be." 65 ILCS 5/11-42-11(e)(5).

IV. DEVELOPMENTS IN OTHER COMMUNITIES

The experience of other communities, most of which are in California, confirms that AT&T is taking a hard-line approach to the local franchise issue. In some cases in which localities have attempted to require SBC-AT&T to obtain a franchise for Lightspeed deployment, the company has sued, or threatened to sue, rather than apply for a franchise.

The issue for AT&T does not appear to be related to the expense of franchise fees. In several instances so far, specifically, in San Ramon and Lodi, California, AT&T has negotiated agreements under which it has agreed to pay a 5% gross-revenue-based fee to the locality. The agreements, however, are explicitly *not* called franchises. AT&T clearly does not wish to establish the precedent of acquiescing to local franchise requirements, but it remains to be seen whether giving an agreement that resembles a cable franchise another name will work to avoid a level-playing-field suit by the incumbent cable operator.[30]

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[28] There is an entire body of level-playing-field law in the cable franchise realm that has evolved over the past two decades, and a complete discussion of it is beyond the scope of this memorandum. See the briefs and decisions in the "Louisville Level Playing Field Litigation" available online at http://www.baller.com/library-comments.html.

[29] The stated purpose of the public hearing is "to determine the public need for such additional cable television franchise, the capacity of public rights-of-way to accommodate such additional community antenna television services, the potential disruption to existing users of public rights-of-way to be used by such additional franchise applicant to complete construction and to provide cable television services within the proposed franchise area, the long term economic impact of such additional cable television system within the community, and such other factors as the franchising authority shall deem appropriate." 65 ILCS 5/11-42-11(e)(2).

[30] As indicated above, the definition of "franchise" in Section 602(9) of the Communications Act, 47 C.F.R. § 522(9), states that an agreement that resembles a franchise will be treated as such "whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system."

In addition, the experience of several communities dramatically undercuts AT&T's assertion that Project Lightspeed imposes no additional burdens on the public rights of way. In fact, one city reported that the Lightspeed upgrades would require the installation of a large above-ground cabinet for every 200-300 homes, mostly likely placed within the public right-of-way.

Walnut Creek, California

In Walnut Creek, California, SBC last year began upgrading above-ground copper facilities as part of a "service upgrade." The City concluded that the "upgrade" would ultimately enable Lightspeed video services, and that therefore a franchise agreement with the City was required. When the City refused to issue SBC construction permits, SBC brought a declaratory judgment action against the City in federal court. The City has filed a Motion to Dismiss, and oral arguments on the motion are scheduled for April 7, 2006.

Livermore, California

Like Walnut Creek, the City of Livermore, Calif. attempted to stop SBC from deploying Lightspeed facilities without a franchise. A news article from February 16, 2006, reported:

> Livermore leaders ... have also stopped installations of [Lightspeed cabinets]. Livermore officials said that, in August, SBC representatives came to city officials to discuss Project Lightspeed and equipment installation. The city wanted to hold discussions about a franchise agreement, but none were held. In early December, SBC applied for a number of encroachment permits for what the city thought was routine work on its regular phone service. 'There was no reference to a system upgrade for Project Lightspeed; our perspective was that it was for routine kind of work commonly done for phone service,' said assistant city manager Jim Piper.
>
> IPTV in San Ramon and elsewhere would require installation of cabinets that are 5 feet tall and 31/2 feet wide, as well as other upgrades to AT&T equipment. 'It came to our attention they were in fact installing Lightspeed cabinets and equipment. When we determined that was the case, we sent a letter revoking the permits and telling them to stop work without talking to us first and getting our permission.'

San Ramon, California

Despite the fact that the Lightspeed upgrade within the city would require installation of more than 41 above-ground cabinets throughout the city, an AT&T official insisted to San Ramon City Council that AT&T was not required to obtain a local franchise under federal or local law

San Ramon City Council reached an agreement with AT&T under which the City acknowledged that AT&T's Internet-protocol video is not a cable service. The City also agreed to allow AT&T to install 41 large, above-ground cabinets for the Lightspeed service. For its part, AT&T agreed, among other things, to pay the City a fee equal to 5% of gross revenue, plus 50 cents per month, per subscriber, to fund local programming.[31]

It is also worth noting that the City of San Ramon (pop. 51,027) is home to a 9,500-employee AT&T facility.

According to news reports, the California Cable and Telecommunications Association has accused the City of "colluding" with AT&T to offer a service that requires a cable franchise. The Association has threatened to sue the City it if goes forward with the agreement. According to an Association official, the agreement "would be contrary to federal and state law and therefore arbitrary and capricious."[32]

Lodi, California

The City of Lodi, California, adopted an ordinance in December 2005 that would have required AT&T to obtain a franchise before offering Lightspeed video service. AT&T promptly filed suit against the City in San Joaquin County Superior Court.[33] Soon afterward, the City reversed itself, and it is reportedly in the process of rescinding its December ordinance. The City said its turnaround was due to the 9th Circuit case of *La Canada Flintridge,* in which the appeals court ruled that California telephone companies, under a state public utilities code and the federal Telecommunications Act, have the right to extend their reach of services and upgrade their networks wherever they want to, as long as this does not interfere with the public interest.

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31 Scott Marshall, Bonita Brewer, "San Ramon Welcoming AT&T Plan, Livermore, Walnut Creek Aren't," Contra Costa Times, February 16, 2006, http://www.mercury news.com/mld/mercurynews/news/breaking_news/13881671.htm

32 Scott Marshall, "Proposed IPTV Service Under Fire," Contra Costa Times, March 2, 2006, http://www.contracostatimes.com/mld/cctimes/news/local/states/california/13997 553.htm

33 Keith Reid, "Lodi's Council Weighs AT&T Fee," Recordnet.com, http://www.recordnet.com/apps/pbcs.dll/article?AID=/20060302/MONEY/603020357/1003.

It is not clear whether Lodi has reached, or will reach, an agreement for compensation from AT&T along the lines of the San Ramon agreement.

Anaheim, California

In late 2005, the Mayor of Anaheim, reportedly a telecommunications industry lobbyist in his professional life, took the position that AT&T should not be required to obtain a franchise for Lightspeed.[34] On March 7, 2006, the Anaheim City Council voted 5-0 to allow AT&T to build out Lightspeed video services within the City. With that vote, Anaheim reportedly became the first city in California to allow AT&T to offer IPTV services.[35]

V. CONCLUSION

For the reasons outlined discussed above, we believe that the City can reasonably conclude that AT&T's Lightspeed video service, particularly in the form that AT&T plans to offer it initially, is a "cable service" provided over a "cable system" and is thus subject to local cable franchise requirements under Section 621 of the Communications Act. For the same reasons, we suggest that the Lightspeed video service is also subject to cable franchise requirements under Illinois and local law.

Furthermore, given the existence of the Illinois level playing field law, there is a strong possibility that Comcast or the state cable association will sue the City if it does not require AT&T to obtain a cable franchise. While AT&T may be amenable to negotiating an agreement that is not called a franchise, the risk of a level-playing-field suit against the City will remain unless the agreement with AT&T is no more favorable or less burdensome than Comcast's franchise.

Finally, if the City is inclined to seek an agreement with AT&T, it should bear in mind that the *Louisville* case and other cases like it hold that the phrase "no more favorable or less burdensome" does not require identical treatment of new providers and incumbents on an item-by-item basis but gives franchising authorities considerable flexibility in entering into agreements with new providers that achieve reasonable parity between incumbents and new providers.

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[34] The FCC subsequently invited the Mayor to participate in an FCC proceeding in Keller, Texas, the site of Verizon's first rollout of its fiber-to-the-home system, concerning video competition.

[35] Martin Rowe, "Anaheim Pushes Fiber Closer to Residences," Test & Measurement World, March 9, 2006, http://www.reed-electronics.com/tmworld/article/CA6314461.html.

EXHIBIT 2

Illinois Level Playing Field Statute – § 65 ILCS 5/11-42-11(e):

(e) The General Assembly finds and declares that, in order to ensure that community antenna television services are provided in an orderly, competitive and economically sound manner, the best interests of the public will be served by the establishment of certain minimum standards and procedures for the granting of additional cable television franchises.

Subject to the provisions of this subsection, the authority granted under subsection (a) hereof shall include the authority to license, franchise and tax more than one cable operator to provide community antenna television services within the corporate limits of a single franchising authority. For purposes of this subsection (e), the term:

(i) "Existing cable television franchise" means a community antenna television franchise granted by a municipality which is in use at the time such municipality receives an application or request by another cable operator for a franchise to provide cable antenna television services within all or any portion of the territorial area which is or may be served under the existing cable television franchise.

(ii) "Additional cable television franchise" means a franchise pursuant to which community antenna television services may be provided within the territorial areas, or any portion thereof, which may be served under an existing cable television franchise.

(iii) "Franchising Authority" is defined as that term is defined under Section 602(9) of the Cable Communications Policy Act of 1984, Public Law 98-549 [47 U.S.C. § 522], but does not include any municipality with a population of 1,000,000 or more.

(iv) "Cable operator" is defined as that term is defined under Section 602(4) of the Cable Communications Policy Act of 1984, Public Law 98-549 [47 U.S.C. § 522].

Before granting an additional cable television franchise, the franchising authority shall:

(1) Give written notice to the owner or operator of any other community antenna television system franchised to serve all or any portion of the territorial area to be served by such additional cable television franchise, identifying the applicant for such additional franchise and specifying the date, time and place at which the franchising authority shall conduct public hearings to consider and determine whether such additional cable television franchise should be granted.

(2) Conduct a public hearing to determine the public need for such additional cable television franchise, the capacity of public rights-of-way to accommodate such additional community antenna television services, the potential disruption to existing users of public rights-of-way to be used by such additional franchise applicant to complete construction and to provide cable television services within the proposed franchise area, the long term economic impact of such additional cable television system within the community, and such other factors as the franchising authority shall deem appropriate.

(3) Determine, based upon the foregoing factors, whether it is in the best interest of the municipality to grant such additional cable television franchise.

(4) If the franchising authority shall determine that it is in the best interest of the municipality to do so, it may grant the additional cable television franchise. Except as provided in paragraph (5) of this subsection (e), no such additional cable television franchise shall be granted under terms or conditions more favorable or less burdensome to the applicant than those required under the existing cable television franchise, including but not limited to terms and conditions pertaining to the territorial extent of the franchise, system design, technical performance standards, construction schedules, performance bonds, standards for construction and installation of cable television facilities, service to subscribers, public educational and governmental access channels and programming, production assistance, liability and indemnification, and franchise fees.

(5) Unless the existing cable television franchise provides that any additional cable television franchise shall be subject to the same terms or substantially equivalent terms and conditions as those of the existing cable television franchise, the franchising authority may grant an additional cable television franchise under different terms and conditions than those of the existing franchise, in which event the franchising authority shall enter into good faith negotiations with the existing franchisee and shall, within 120 days after the effective date of the additional cable television franchise, modify the existing cable television franchise in a manner and to the extent

necessary to ensure that neither the existing cable television franchise nor the additional cable television franchise, each considered in its entirety, provides a competitive advantage over the other, provided that prior to modifying the existing cable television franchise, the franchising authority shall have conducted a public hearing to consider the proposed modification. No modification in the terms and conditions of the existing cable television franchise shall oblige the existing cable television franchisee (1) to make any additional payment to the franchising authority, including the payment of any additional franchise fee, (2) to engage in any additional construction of the existing cable television system or, (3) to modify the specifications or design of the existing cable television system; and the inclusion of the factors identified in items (2) and (3) shall not be considered in determining whether either franchise considered in its entirety, has a competitive advantage over the other except to the extent that the additional franchisee provides additional video or data services or the equipment or facilities necessary to generate and or carry such service. No modification in the terms and conditions of the existing cable television franchise shall be made if the existing cable television franchisee elects to continue to operate under all terms and conditions of the existing franchise.

If within the 120 day period the franchising authority and the existing cable television franchisee are unable to reach agreement on modifications to the existing cable television franchise, then the franchising authority shall modify the existing cable television franchise, effective 45 days thereafter, in a manner, and only to the extent, that the terms and conditions of the existing cable television franchise shall no longer impose any duty or obligation on the existing franchisee which is not also imposed under the additional cable television franchise; however, if by the modification the existing cable television franchisee is relieved of duties or obligations not imposed under the additional cable television franchise, then within the same 45 days and following a public hearing concerning modification of the additional cable television franchise within that 45 day period, the franchising authority shall modify the additional cable television franchise to the extent necessary to insure that neither the existing cable television franchise nor the additional cable television franchise, each considered in its entirety, shall have a competitive advantage over the other.

No municipality shall be subject to suit for damages based upon the municipality's determination to grant or its refusal to grant an additional cable television franchise, provided that a public hearing as herein provided has been held and the franchising authority has determined that it is in the best interest of the municipality to grant or refuse to grant such additional franchise, as the case may be.

It is declared to be the law of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Illinois Constitution [920 ILCS 7/6], that the establishment of minimum standards and procedures for the granting of additional cable television franchises by municipalities with a population less than 1,000,000 as provided in this subsection (e) is an exclusive State power and function that may not be exercised concurrently by a home rule unit.

EXHIBIT 3

WHEATON, ILLINOIS ZONING CODE PURPOSE SECTION

1.1 This ordinance, including the zoning map made a part hereof, shall be known and may be cited and referred to as the "Wheaton Zoning Ordinance."

1.2 This ordinance is adopted for the following purposes:

To promote the public health, safety, morals, comfort, convenience and general welfare of the residents of the City of Wheaton;

To conserve the values of property throughout the City of Wheaton and to protect the character and stability of residential, business and industrial areas;

To provide adequate light, air, privacy and convenience of access to property;

To lessen or avoid congestion in the public streets and highways in the City of Wheaton and surrounding areas;

To regulate and restrict the location and use of buildings, structures and land for trade, industry, residence and other users, and to regulate and restrict the intensity of such uses;

To divide the City of Wheaton into districts of such number, shape, area and of such different classes, according to the use of land and buildings and the intensity of such use, as may be deemed best suited to carry out the purposes of this ordinance;

To prohibit locations and uses of buildings or structures and uses of land that are incompatible with the type of development planned for specified zoning districts in the City of Wheaton;

To prevent additions to and alterations or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder;

To protect against fire, explosion, noxious fumes and other dangers;

To fix reasonable standards to which buildings and structures shall conform;

To provide for the gradual elimination of those uses that would not now be permitted in the district in which they are located and are adversely affecting

the orderly and beneficial development of the City of Wheaton;

To define and limit the powers and duties of administrative officers and bodies as provided herein;

To aid in the implementation of the Wheaton Comprehensive Plan;

To prescribe penalties for the violation of this ordinance and amendments to it and to provide for its enforcement.

EXHIBIT 4

Phone company plays unfairly

LEIGH ANN HUGHES

In your July 28 editorial, "Village won't deliver choice," the Kane County Chronicle takes to task elected officials in North Aurora and Geneva for taking reasonable steps to protect their residents.

Like the leaders of many other communities, they are trying to ensure that promises made to their residents are kept.

The phone company's recent claims to the contrary notwithstanding, the only thing keeping it from very quickly entering the video market – as it has done before – is its unwillingness to play by the same rules as everyone else, meet some basic community needs, and sign a contract that will make its investment promises enforceable.

Illinois' local cable franchise structure has been, and continues to be, an investment driver and job creator.

These are nonexclusive local agreements. They have provided a framework under which cable has evolved from a one-way alternative to broadcast TV to fiber-optic networks that deliver broadband Internet, high-definition television, thousands of hours of programming on-demand, and most recently, the first real alternative to the phone company's 100-year domination of home telephone service.

These developments have been financed with private risk capital, not a government-guaranteed rate of return structure like that of the phone companies.

This investment in Illinois' future is a critical cog in our state's technology landscape. In the past five years, the cable industry has invested billions of dollars in Illinois. Today, broadband Internet via cable modems is available to virtually all of Chicago area households.

These investments have occurred in the face of intense competition from satellite providers and other wired competitors, including telephone companies.

While always selective about which Illinois communities it was willing to serve, the phone companies historically were willing to sign meaningful video franchise agreements with communities, agreements that ensured a level playing field with competitors and that held promises were kept.

Unfortunately, things have changed.

For example, Comcast's franchise agreements with Geneva and North Aurora specifically state our pledge, enforceable by the communities' elected leaders, to make available the same services to all residents and all neighborhoods. Much smaller companies than our own have made this enforceable promise, agreeing to franchises with the local community.

By contrast, representatives of the phone company advocating the loudest for change in Illinois have made it absolutely clear: They, and only they, will decide which customers, if any, will benefit from any modernization of the phone system.

Early indications are that they will not guarantee in writing that they will make their cable TV product available to even a single resident in any given community.

This ability to cherry-pick customers will give the phone company a market advantage that is unrelated to its products' quality or pricing.

The bottom line: The phone companies are trying to fix the rules so winners and losers are determined not by consumers, but by regulation. Like services should be treated and regulated alike.

We do not seek to succeed through regulatory maneuvers, but through investing and delivering products that customers want to buy.

Fair is fair. New competitors to the video-provider market, such as phone companies, should be subject to the same rules as everyone else.

By upholding Illinois' local cable franchise structure, competition has and will continue to flourish, and consumers will be the beneficiaries.

• Leigh Ann Hughes is an area vice president of Comcast.

EXHIBIT 5

at&t

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August 3, 2006

Mr. David E. Bennett
Executive Director
Metropolitan Mayors Caucus
177 North State Street, Suite 500
Chicago, Illinois 60601

Dear Mr. Bennett:

AT&T Illinois was pleased to meet with representatives of the Metropolitan Mayor's Caucus on July 21, 2006, and to discuss our plans to provide competitive video service in the metropolitan Chicago area.

As you know, AT&T Illinois is negotiating with various municipalities the terms of a Competitive Video Service Agreement under which AT&T Illinois would provide to municipal residents the benefits of choice, value and competition that AT&T Illinois's competitive video service offers. AT&T Illinois already has entered into one such Competitive Video Service Agreement with the City of North Chicago.

In its negotiations with each municipality, just as we did at our meeting on July 21, AT&T Illinois makes clear that there is one particular issue to which AT&T Illinois cannot commit, viz., a build-out requirement related to AT&T Illinois's IP video service. At the same time, however, AT&T Illinois consistently makes clear that it will commit to provide video service to all residents within its service area in a municipality within 18 months of entering into a Competitive Video Service Agreement (or two years for annexed areas). This service will be provided either through AT&T Illinois's *Uverse* IP video service product, our AT&T Homezone integrated satellite and broadband product, or our AT&T/Dish Network satellite offering.

AT&T Illinois has included the following language in its Competitive Video Service Agreement, demonstrating its commitment to provide video service to all residents within its service area.

> AT&T, subject to the terms herein, will provide video services to all residences located within the Service Area (as of the Effective Date) within eighteen (18) months of the Effective Date. In an area annexed to the Municipality to which AT&T provides service after the Effective Date ("Annexed Service Area"), AT&T will, subject to the terms herein, offer video services to all residences in the Annexed Service Area within two (2) years of the effective date of the annexation. Upon a showing of legal, technical or other valid causes that make it impossible or unreasonable for the services provided for in this Section to be furnished by AT&T, the Municipality may give time extensions. Any such extensions shall be in writing and in response to a request in writing by AT&T with detailed justification.

Proud Sponsor of the U.S. Olympic Team

EXHIBIT 6

(online at http://www.dailyherald.com/story.asp?id=217696, accessed 8/17/06)

Naperville pulls plug on Lightspeed

By Jake Griffin
Daily Herald Staff Writer
Posted Thursday, August 17, 2006

Living up to its name, AT&T's plans to roll out its controversial Project Lightspeed multimedia service in Naperville were quashed in the blink of an eye.

An angry city council rejected the telecommunication giant's request Tuesday to offer the service without full build-out in the city after learning the company had reneged on several negotiating points previously agreed upon.

City Manager Peter Burchard said the city received a letter Tuesday morning from AT&T officials indicating they were pulling back from the bargaining table after more than five months of talks.

"I'm very sorry I wasted my time meeting with AT&T," Councilman James Boyajian said. "I have not dealt with many companies that showed less integrity than AT&T on this thing and if this is the way they are going to do business, other municipalities better watch out."

AT&T officials said the council's vote bars competition.

"The city council has known from the start that any build-out provision would be an absolute deal breaker and stop the competition dead in its track," AT&T spokesman Rob Biederman said.

Project Lightspeed is touted as the telephone company's response to cable companies dabbling in the phone industry. The AT&T service would offer video, phone and high-speed Internet through phone lines. But AT&T officials didn't want to subscribe to state laws that govern other cable companies. They contend they are not a cable company.

The two cable companies currently offering service in Naperville, Comcast and Wide Open West, fought AT&T's proposal, saying all the services should compete on a level playing field.

AT&T has sued other local municipalities — including Wheaton, Roselle and Geneva — for not allowing the company to offer the service to residents. The Naperville vote didn't preclude the company from offering the service, it just requires AT&T to offer it to everyone in the city like the other cable companies do.

Burchard said the city even offered one option where AT&T wouldn't have to provide full coverage if it paid the $1.7 million the city receives annually in cable franchise fees. He said that was rejected by AT&T.

When asked if the company would sue, AT&T Vice President Mike Tye said, "I can't answer that. We'll go find a community that wants us to be there."

City officials said they believe AT&T never wanted a deal with Naperville, it just wanted to build a case against municipalities to show congressmen and senators why federal intervention is necessary. A court reporter sat through Tuesday's debate on AT&T's dime.

"They're going to say they tried to negotiate, but the cities wouldn't cooperate," Councilman Doug Krause said. "There's legislation that's passed the House that will allow companies to do whatever they want in a municipality's right-of-way and that would usurp all municipal authority."

Councilmen said they would be contacting Illinois senators Dick Durbin and Barack Obama to make sure they knew how AT&T handled the negotiations.

"We've wasted and spent an awful lot of time with those guys and if they really wanted an agreement to put that in our town, we sure made that available," Councilman Richard Furstenau said. "This apparently was just posturing to them and I think they feel they're going to do better in Congress where they've spent a lot of money to get legislation they want passed."

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